

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**

No. 03-619V  
Filed: July 19, 2007

NOT TO BE PUBLISHED

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CODY HILL, a minor by his mother and \*  
natural guardian, STEPHANIE SHERMAN, \*

Petitioner, \*

v. \*

Attorneys' Fees and Costs;  
Guardianship Costs

SECRETARY OF THE DEPARTMENT \*  
OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

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*Renee Gentry, Shoemaker and Associates, Vienna, VA, for petitioner*  
*Lisa Watts, U.S. Department of Justice, Washington, D.C., for respondent*

**ATTORNEYS' FEES AND COSTS DECISION<sup>1</sup>**

**GOLKIEWICZ**, Chief Special Master.

**I. PROCEDURAL BACKGROUND**

On March 19, 2003, petitioner, Stephanie Sherman, filed a petition on behalf of her son, Cody Hill, pursuant to the National Vaccine Injury Compensation Program<sup>2</sup> ("the Act" or "the

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<sup>1</sup>The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

<sup>2</sup> The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine  
(continued...)

Program”) alleging that her son’s injuries were the result of his May 16, 2000 vaccinations. On April 2, 2004, respondent filed his Rule 4 Report conceding petitioner’s entitlement to compensation in this case under the Vaccine Act for Cody Hill’s vaccine-related injuries. The parties engaged in settlement negotiations for the purpose of ascertaining petitioner’s long-term vaccine-related needs. On September 6, 2006, respondent filed his Proffer on Award of Compensation to which petitioner acceded. The undersigned issued a Decision on September 8, 2006 adopting the parties’ proffer. Judgment entered on October 13, 2006.

On April 5, 2007, petitioner filed her motion for attorneys’ fees and costs. Application for Attorneys’ Fees & Costs (“Fee App.”). On April 20, 2007, respondent filed his opposition. Respondent’s Opposition to Petitioner’s Application for Attorneys’ Fees and Costs (“R. Opp.”). Petitioner filed her reply on May 3, 2007. Petitioner’s Reply to Respondent’s Opposition to Petitioner’s Application for Attorney’s Fees and Costs (“P. Reply”). This attorneys’ fees issue is now ripe for decision.

## II. DISCUSSION

### *Respondent’s Position*<sup>3</sup>

Respondent’s only opposition to petitioner’s application is to the costs incurred for preparing a trust and establishing a state guardianship. Respondent objects to the \$1,000 in costs incurred from the law firm of Mackendon, McCormick & King for establishing a legal guardianship for Cody and approximately \$1,928.50 in attorney fees for review of guardianship and trust documents. R. Opp. at 2. Respondent argues that these fees and costs are not compensable because the Vaccine Act precludes compensation for services and expenses associated with establishing a guardianship or a trust. *Id.* Respondent argues that the Court of Federal Claims has “consistently held that attorneys’ fees and other costs incurred to establish or to administer an estate are ‘not part of the prosecution of the vaccine petition,’ and so are not compensable . . . .” *Id.* at 2-3.

### *Petitioner’s Position*

Petitioner argues that the respondent required the establishment of a guardianship as part of the damages award. Thus, under the “but for” test discussed by the undersigned in Thomas v.

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<sup>2</sup>(...continued)

Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) (“Vaccine Act” or the “Act”). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

<sup>3</sup> Respondent has no objection to the hourly rates for petitioner’s attorneys or their medical and life care planner experts. R. Opp. at 1.

Sec'y of Dept. of Health and Human Servs.<sup>4</sup> and by my colleague in Velting v. Sec'y of Dept. of Health and Human Servs.<sup>5</sup>, petitioner would not have incurred the expenses associated with establishing the guardianship, but for respondent's requirement. P. Reply at 2.<sup>6</sup> Petitioner notes that the undersigned's damages order indicated that reasonable costs related to the guardianship would be reimbursable if, but for, the Vaccine Program the costs would not have been incurred. Id. at 3; see Damages Order, filed Apr. 8, 2004.

In this case, Section II (3) of respondent's Proffer states that no payments shall be made to petitioner until respondent is presented with documentation establishing that petitioner has been appointed guardian/conservator of Cody's estate. P. Reply at 2 n.1. Petitioner argues that "[r]espondent would not agree to the damages settlement *without* that language." Id. (emphasis in original). Further, petitioner's counsel must necessarily rely on local counsel to establish the guardianship as petitioner's counsel does not have expertise on the guardianship laws of every state. Moreover, petitioner's counsel must work with local counsel to explain the components of the damages award, secure documents from local counsel and ensure they are provided to respondent's counsel. Id. at 2. Thus, because petitioner did everything that respondent asked in order to receive her award, petitioner requests that these costs be reimbursed. Id. at 3. Finally, petitioner's counsel expended an additional hour of work in preparing her response and requests an additional \$215.00 in attorneys' fees. Id.

### *Analysis*

The undersigned has previously fully discussed and analyzed the issue of guardianship costs as part of an award of attorneys' fees and costs in Ceballos v. Sec'y of Dept. of Health and Human Servs. 2004 WL 784910, No. 99-97V (Fed. Cl. Spec. Mstr. Mar. 25, 2004). In that case, the undersigned found that the costs associated with the establishment of a guardianship are reimbursable if the guardianship is established by order of the special master or as an element of the agreed-upon settlement with respondent. Id. at \*22. Therefore, a full analysis is not needed in the instant matter.

In the case *sub judice*, petitioner correctly states that establishing a guardianship in order to receive payments was a requirement of respondent's proffer. Respondent's Proffer on Award of Compensation at 5, filed Sept. 6, 2006. Respondent cited no legal authority, which is binding, that is contrary to the undersigned's decision in Ceballos. The respondent does cite to other Court of Federal Claims decisions that disallowed guardianship costs. The undersigned is aware that other special masters and judges of the Court of Federal Claims have issued decisions

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<sup>4</sup> 1997 WL 74664, No. 92-46V (Fed. Cl. Spec. Mstr. Feb. 3, 1997).

<sup>5</sup> 1996 WL 937626, No. 90-1423V (Fed. Cl. Spec. Mstr. Sept. 24, 1996).

<sup>6</sup> Petitioner's reply was not paginated. For ease of reference, the court has paginated its copy beginning with page 1 and will be cited as "P. Reply at [page number]."

holding that guardianship costs are not compensable. However, those cases were analyzed and discussed in Ceballos. Ceballos at \*18-\*22. The undersigned respectfully disagrees with those contrary rulings.

Thus, the undersigned will continue to award the costs of establishing a guardianship as part of an award of attorneys' fees and costs if the guardianship is established by court order or as part of the respondent's settlement with petitioner, which this court must ultimately approve. Accordingly, petitioner is awarded the full amount of attorneys' fees and costs requested in her application and amended application.

### III. CONCLUSION

After a thorough review of petitioner's fee application and respondent's objections, petitioner is awarded **\$37,101.55 in attorneys' fees** and **\$35,316.59 in attorneys' costs**. The award shall be made payable jointly to petitioner and her attorneys. Additionally, petitioner is awarded **\$1,150.00 in petitioner's costs**. The award shall be made payable solely to petitioner.

Accordingly, pursuant to Vaccine Rule 13, petitioner is hereby awarded a **total of \$73,568.14 in attorneys' fees and costs**.<sup>7</sup> In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment according to this decision.<sup>8</sup>

**IT IS SO ORDERED.**

s/ Gary J. Golkiewicz  
Gary J. Golkiewicz  
Chief Special Master

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<sup>7</sup>This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Sec'y of Health and Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).

<sup>8</sup>Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.